
(2016) 04 PAT CK 0014

In the Patna High Court

Case No : Miscellaneous Appeal No.21 of 2011

Divisional Manager, National Insurance Company Ltd

APPELLANT

Vs

Mazda Khatoon

RESPONDENT

Date of Decision : 12-04-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 173

Citation : (2016) 3 BLJud 214

Hon'ble Judges : Mr. Aditya Kumar Trivedi, J.

Bench : Single Bench

Advocate : Mr. Raj Kumar Singh Vikram, Advocate, for the Appellant; Mr. Bhola Prasad, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Mr. Aditya Kumar Trivedi, J.—(Cav) - Instant appeal has been preferred in accordance with Section 173 of the M.V. Act against the judgment dated 07.09.2010, award dated 27.09.2010 passed by IIIrd Additional District Judge cum Additional Motor Vehicle Accident Claims Tribunal, Bhagalpur in Claim Case no.23 of 1995 whereby and where under allowing the claim petition, the learned Tribunal directed the appellant/opposite party no.3 to pay Rs.1,70,200/- in lieu of compensation. The amount appertaining to Rs.50,000/- so paid under the guise of Section 140 of the M.V. Act has been directed to be deducted and remaining amount, appertaining to Rs.1,20,200/- has been directed to be paid within thirty days along with an interest at the rate of 6% per annum from the date of institution of the case.

2. On account of death of Md. Rauf Khan, on 22.02.1995 at about 07:00 AM, his legal heirs filed Claim Petition No.23 of 1995 against the owner, driver, insurance company and for that, divulged that Mukesh Choudhary, driver while driving the tractor bearing registration no. BR-10A 1028 in rash and negligent manner ultimately cost life of Md. Rauf at the spot while others also sustained injury. During course thereof, one cow was also dashed and died. It has also been

disclosed that for the aforesaid incidence, a criminal case was instituted on the fardbeyan of brother of deceased. it has further been disclosed that at the time of accident, deceased was aged about 35 years. A sum of Rs.3 lacs was claimed in lieu of compensation showing monthly earning of deceased as Rs.1200/-.

3. From the lower court record, it is evident that owner and driver failed to appear however, order sheet of the lower court record is completely silent with regard to having the case fixed on ex-parte against them.

4. Appellant/insurance company appeared and filed W.S. wherein apart from raising ornamental objection, it has been pleaded that driver of the vehicle in question was not at all holding valid and proper driving license and so, the owner of the vehicle committed breach of terms of policy whereupon, insurer is not at all responsible to indemnify in terms of Section 149(2) of the MV Act. It has also been stated that the vehicle in question was plying without fitness, road permit, route permit and on account thereof, there happens to be violation of terms of the policy.

5. It has also been stated that there happens to be no document regarding earning of the deceased to a tune of Rs.1200 per month. Further been asserted that deceased died of his own fault and on account thereof, is not at all entitled for compensation. Furthermore, the insurer had reserved right of filing a petition in terms of Section 170 of the MV Act in case, there happens to be absence of owner.

6. From the order sheet of the lower court record, it is evident that a petition under Section 170 of the MV Act was filed on 12.04.2005. The successive order sheets further speak that same was not allowed as was not pressed.

7. It is further evident from lower court record that a petition under Section 140 of the MV Act was filed on 11.10.1996 and the same was allowed vide order dated 07.01.1997.

8. The learned lower court, as is evident from the judgment impugned failed to frame any issue on the respective pleadings of the party however, allowed hearing where under six witnesses were adduced on behalf of respondent/claimant along with exhibits of the relevant documents. The appellant-insurance company /opposite party also examine witness as well as exhibit document in its defence and lastly, after hearing argument, by the judgment and decree impugned, allowed the claim petition.

9. While the appeal remained pending after admission, on a prayer made by the appellant, respondent no.2, owner of the vehicle has been deleted vide order dated 15.10.2015 with a condition that appellant will have to bear its repercussion.

10. As stated above, though there remained absence of owner as well as driver before the learned lower court, having absence of recording by the learned lower court allowing the petition to proceed ex-parte against them and further, having

the prayer made on behalf of appellant under Section 170 of the MV Act pending and subsequently thereof, conduct of the appellant getting the owner deleted on its own risk, if taken together, its impact has to be seen first.

11. It is needless to say that as insurance company has to indemnify liability of the owner in terms of the policy, on account thereof, apart from statutory protection in terms of Section 149(2) of the MV Act, has been given an opportunity to substitute the owner in case there happens to be absence, in terms of Section 170 of the MV Act. That means to say, in absence of such permission which could have been under Section 170 of the MV Act, the insurance company was not at all competent to plead and challenge the claim petition on the grounds available to the owner save and except whatever been provided in terms of Section 149(2) of the MV Act, statutory one.

12. The aforesaid event has also been taken into consideration by the Hon'ble Apex Court in Kishan Gopal & Anr. v. Lala & Ors. reported in (2014) 1 SCC 244.

"26. The Insurance Company has also not obtained permission from the Tribunal under Section 170(b) of the M.V. Act to contest the case on the defence of the insured as the driver and the insured both remained ex-parte in the proceedings before the Tribunal and therefore, it could not have contested the case on merits as held by this Court in the case of National Insurance Company v. Nicolletta Rohtagi reported in 2002(7) SCC 456. It is also not clear in the counter statement filed by the Insurance Company before the Tribunal that the claim petition was filed by the appellants on account of collusion between them and respondent Nos.1 and 2, the driver and the owner of the vehicle respectively."

13. The learned counsel for the appellant during course of argument was very much conscious and on account thereof, confined his submission on two aspects. The first happens to be with regard to status of the deceased and the second, the vehicle tractor was insured for agricultural purpose only, consequent thereupon, plying the vehicle in different manner other than agricultural purpose, meeting with an accident, costing life of occupant being in breach of terms of policy therefore, appellant /insurance company would not be liable to indemnify the owner as well as saturate the award amount.

14. Further, elaborating the submission, it has been urged by the learned counsel for the appellant that admittedly vehicle in question (tractor bearing registration no. BR-10A 1028) was insured under appellant for agricultural purpose only. From the pleading as well as evidences adduced on behalf of claimant, it is apparent that at the relevant time of accident vehicle was not at all engaged in agricultural work nor the vehicle met with an accident during course of performing agriculture work. Thus, the vehicle met with an accident while it was not at all engaged for agricultural purpose for which was insured and therefore, at the time of accident, the vehicle was being plied contrary to the terms of the policy.

15. Then it has been submitted that from the policy, it is apparent that no

liability was borrowed in terms of policy regarding passenger nor the owner had paid extra premium for the same. Therefore, presence of deceased over tractor who was not at all driver of the vehicle and died in an accident caused by the aforesaid tractor would not drail the appellant to share the burden as, the status of deceased was that of gratuitous passenger. Further relied upon (2005) 12 SCC 243 (National Insurance Co. Ltd. v. Bommithi Subbhayamma & Ors.), 2007 3 SCALE 397 (New India Assurance Co. Ltd. v. Vedwati & Ors.), 2007 7 SCALE 753 (Oriental Insurance Co. Ltd. v. Brij Mohan & Ors.), 2008(1) PLJR 127(SC) 127 (United India Insurance Company Limited v. Serjerao & Ors.).

16. On the other hand, refuting the submission made on behalf of appellant, it has been argued by the learned counsel for the respondent that judgment and award passed by the learned tribunal happens to be based upon sound legal principle as well as duly substantiated by the evidence on record hence need not attract interference.

17. After three judge Bench decision relating to Asha Rani case reported in (2003) 2 SCC 223 the approach relating to share burden by the insurance company concerning gratuitous passenger has changed and there happens to be consistency on that very score till today. All the judicial pronouncement so referred and relied upon on behalf of appellant reaffirms in same manner. On account thereof, there could not be divergence of opinion that gratuitous passenger has no say against insurer nor the insurer could be held responsible for the payment of award. Facts of the present case, as has already been divulged here in before regarding lapses at the end of appellant, bears same sort of peculiarity, where under it could be seen whether the principle laid down by the Apex Court, as referred above, did apply.

18. After deleting presence of owner during course of pendency of instant appeal is bound to jolt the appellant. As the tribunal had not proceeded against owner in ex-parte manner, therefore, his presence was very much needed even at the appellate stage. So, firstly it should be seen whether in absence of owner, appeal is maintainable? Whether owner is a necessary party. Whether presence of appellant, insurer will serve the purpose. There basic question has to be answer in negative as, owner happens to be necessary party, on account of being forfeasor. Further more, presence of driver is not going to give a life, as being employee, his status is of found limited to the extent, that too when there happens to be paucity of evidence relating to violating the direction of the employer while discharging his duty. Here, neither it has been pleaded nor substantiated. Therefore, act or omission which was committed by the driver while being under employment and for that it would be presumed that there was consent at the end of owner. Hence, owner bore vicarious liability for the same. The aforesaid vicarious liability of owner is to be discharged by the appellant. As there happens to be absence of owner, then in that event, a question arose, who will share the burden.

19. Furthermore, visualizing a situation where under appellant is found not liable

for payment of the compensation, then in that event, owner could be directed to pay the compensation on account of death of deceased in an accident. Then the question arose, whether in absence of owner, any order adverse to his interest could be passed and further, would be executable. Therefore, presence of owner happens to be necessary party and having him removed from the proceeding ultimately identify the appeal non-maintainable on account of non-joinder of necessary party. Apart from this, as the prayer under Section 170 of the MV Act has not been allowed therefore, appellant could not be allowed to replace owner. Moreover, it is the claimant who has to see who should be impleaded. Once that exercise is over, in appeal those person being identified as parties before the lower court should stay. Section 173 of the M.V. Act did not prescribe such events.

20. From the claim petition it is evident that it no where states that deceased while was over tractor, met with an accident. However during course of evidence, witnesses have stated that at the time of accident, deceased along with others were sitting over trolley (trailer) as was engaged in transporting soil and during course thereof the tractor was being rashly and negligently driven, turned turtle, costing life of deceased.

21. During course of cross-examination none of the witnesses were cross-examined over activity, whether soil was being transported for agricultural purpose, or was under commercial activity. So, violation of terms of policy could not found duly brought upon record. In likewise manner, independent status of deceased as gratuitous passenger also not been substantiated.

22. In *Fahim Ahmad & Ors. v. United India Insurance Company Ltd. & Ors.* reported in (2014) 12 SCC 148, it has been held:-

" 7. We may also notice that this Court in *National Insurance Co. Ltd. v. V. Chinnamma & Ors.* , JT 2004 (7) SC 167, held that:

"16. ??carriage of vegetables being agricultural produce would lead to an inference that the tractor was being used for agricultural purposes, but the same itself would not be construed to mean that the tractor and trailer can be used for carriage of goods by another person for his business activities."

Thus, a tractor fitted with a trailer may or may not answer the definition of "goods carriage" contained in Section 2(14) of the said Act.

23. In *Ramchandra v. Regional Manager, United India Insurance Company Limited* reported in (2013) 12 SCC 84, it has been held:

"29. In absence of the owner of the vehicle, when the Motor Accident Claims Tribunal or the High Court leaves it open to the insurance company subsequently to realise the amount from the owner of the vehicle by instituting a fresh proceeding in view of the ratio of the case of *General Manager, Kerala State Road Transport Corporation, Trivandrum v. Sussama Thomas* , (1994) 2 SCC 176, it gives rise to a fresh proceeding between the owner and the insurance company putting unnecessary burden on the Motor Accident Claims Tribunal to try the

issue all over again. In fact, if the insurance company were to succeed in establishing by leading cogent evidence at the initial stage itself before the Tribunal that it is the owner of the vehicle which is liable to pay even if the evidence is ex parte in nature, it would at least facilitate the issue in the subsequent proceeding when the insurer initiates proceeding for realising the amount from the owner/insured. But in absence of such evidence, the insurer/companies are a loser and enures advantage to the owner who happens to gain by choosing not to appear. The Insurance Companies would fair better if they were to address this issue before the Tribunal itself instead of becoming wiser at the stage of appeal. What is wished to be emphasized is that if the owner chooses not to appear before the Tribunal although his appearance is necessary in a given case, the insurance company would do well instead of acquiescing with their absence to their detriment giving an upper edge to the owner at their own peril."

24. The issue revert back over theme of deletion of owner. In absence of owner, whether insurance company could raise the plea taking into account evidence of DW1, who had appeared to depose over fake driving licence. In that event, Insurance Company would have substantiated by cogent and reliable evidence that owner was knowing since before regarding fake driving license even then employed and on account thereof terms of policy has been breached that too, having presence of owner only.

25. After giving thoughtful and minute observation to the facts and circumstances of the case as well as reasons so assign herein above, instant appeal sans merit and is accordingly dismissed. Appellant is directed to abide with the direction given by the learned Tribunal to pay the compensation and interest in terms of award within two months. However, in the facts and circumstances of the case parties will bear their own cost.